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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 934

CLEM LOCKERTY, ANTHONY CARUSO, ET AL.,
APPELLANTS

v.

CHARLES M. PHILLIPS, UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEW JERSEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the district court has not yet been reported.

JURISDICTION

The judgment of the district court was entered on April 2, 1943. Petition for appeal was filed and appeal was allowed on April 9, 1943. Probable jurisdiction was noted on April 19, 1943. The jurisdiction of this Court rests on the Act of August 24, 1937, 50 Stat. 754, 28 U. S. C., sec. 380 (a).

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QUESTIONS PRESENTED

1. Whether the jurisdiction of the district court to restrain the enforcement of criminal proceedings for violation of price regulations under the Emergency Price Control Act was validly withdrawn by Section 204 (d) of that Act.

2. Whether, apart from the express provisions of Section 204 (d), the case was within the equity jurisdiction of the district court.

STATUTES AND REGULATIONS INVOLVED

The statute involved is the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C., Appendix 901, copies of which will be furnished to the Court. Maximum Price Regulation 169 and Revised Maximum Price Regulation 169 will be found, respectively, in 7 Federal Register 4653 and 10381.

STATEMENT

This is a direct appeal from a judgment of the District Court of the United States for the District of New Jersey, dismissing a complaint for injunction to restrain the United States Attorney from prosecuting criminal actions now pending against appellants in that district, and future actions asserted to be threatened, for violation of the Emergency Price Control Act and Maximum Price Regulation 169 as originally issued and as revised. A statutory District Court of three judges convened to pass upon the complaint sustained a

motion by the defendant United States Attorney, appellee herein, to dismiss the suit.

The amended complaint was filed on March 26, 1943 (R. 3, 8–30). It alleged that plaintiffs (appellants herein) own well-established and valuable businesses as wholesale meat merchants in the northern part of the state of New Jersey, their business consisting of the purchase of meat from meat packers and the sale thereof at wholesale to retail dealers (R. 9); that the prices at which wholesale meat dealers such as plaintiffs are able to distribute their products to the retailer, and through him finally to the consumer, depend upon cost factors present at various stages in the productive and distributive processes of the meat industry as a whole, the available supply being controlled by the volume of slaughter of the packers, which in turn depends upon the packers' expectation of profit (R. 9–10); that the Price Administrator, in issuing Maximum Price Regulation No. 169 and Revised Maximum Price Regulation No. 169, setting maximum prices on sales of wholesale cuts of beef, had failed to give due consideration to the "setup" of the meat industry as a whole (R. 17); that the regulations disturbed the flow of meat supplies from the packers because uncontrolled livestock prices make it unprofitable for packers to slaughter livestock; and that the regulations threatened to put plaintiffs out of business by shutting off their supplies of meat (R. 17–18).

It was further alleged that plaintiffs' business had been made the subject of extensive investigation by representatives of the Administrator, and that criminal informations and indictments, containing multiple counts, had been filed against plaintiffs charging them with violations of the Act and the regulations (R 19–20); that each count of the said indictments, as shown in a typical count set forth in the complaint, was based upon an alleged single sale of meat by each of the plaintiffs to one of its retail customers, and that in many of the indictments an additional count was contained charging record-keeping violations (R. 20–21); that under the provisions of section 205 (b) of the Act, and in view of the nature of plaintiffs' business and the detailed and extensive character of the investigation made (and still being made) by representatives of the Administrator, plaintiffs were threatened with a multiplicity of criminal suits, which would result in irreparable injury to them (R. 22–23).

The complaint alleged further that the Act upon which the pending and allegedly threatened criminal prosecutions were based is unconstitutional on various grounds and, in particular, because the statutory plan of exclusive review is unconstitutional, plaintiffs thus being threatened with a deprivation of their procedural rights under the Constitution in the pending and allegedly

threatened criminal prosecutions (R. 26–28); that each of the plaintiffs had filed a motion to quash the indictments on the ground that the Act and the regulations were unconstitutional (R. 26); and that unless plaintiffs are granted the relief prayed for in their bill, they will be wholly without remedy against irreparable injury (R. 29).

The complaint prayed that the Court declare the Act, and particularly sections 204 (c) and 204 (d), unconstitutional, and that the defendant United States Attorney be restrained from proceeding with the pending criminal suits, from instituting any further criminal prosecutions against plaintiffs, and from interfering with plaintiffs' business in any manner under authority of the Act (R. 29–30).

On March 11, 1943, the Government filed its motion to dismiss the complaint on the grounds, *inter alia*, that the Court was without jurisdiction of the subject matter in view of the provisions of section 204 (d) of the Act, and that a court of equity ought not to exercise its jurisdiction to restrain pending criminal prosecutions (R. 6–7).

On March 29, 1943, the three-judge District Court rendered its opinion sustaining the motion to dismiss on the ground that section 204 (d) of the Act deprived the court of jurisdiction, and that this section is constitutional. The opinion was delivered by Judge Maris; a dissenting opinion was delivered by Judge Fake (R. 37–42).

SUMMARY OF ARGUMENT

I

1. The court below properly held that its jurisdiction to grant the injunctive relief sought had been withdrawn by the explicit provisions of Section 204 (d) of the Emergency Price Control Act. Those provisions are part of a coherent statutory procedure which is designed for protection against the premature interruption and variegated enforcement of wartime inflation control, and which at the same time affords to aggrieved persons an orderly avenue of administrative and judicial review. The validity of regulations and of the Act itself may be challenged in the Emergency Court of Appeals and on review in this Court; the record in such proceedings is formulated by protest or application for adjustment addressed to the Administrator. Other courts may consider the validity of the Act itself as a defense in enforcement proceedings, but may not consider the validity of regulations, nor may they entertain suits brought to enjoin the enforcement of the Act or regulations thereunder. No court, including the Emergency Court of Appeals, may grant stays or interlocutory injunctive orders restraining the operation of regulations. The necessity for such a procedural pattern is evident in the light of the special problem of effective control of inflation in wartime. Price inflation is cumulative and irremediable. If it is to be con-

trolled at all it must be controlled uniformly, without delay, and without interruption.

2. The withdrawal of jurisdiction from the district court to entertain a suit for injunctive relief against enforcement of the Act may be rested not only on the war powers of Congress but on its authority over the jurisdiction of the inferior federal courts. Familiar examples of such legislation are Section 3224 of the Revised Statutes and the Norris-LaGuardia Act. Here, however, Congress has not simply withdrawn such jurisdiction; it has distributed it by conferring it exclusively on the Emergency Court of Appeals, with review in this Court. In this respect the legislation is comparable to the typical procedure prescribed for the review of orders of federal administrative agencies. Under such statutes, of which the Federal Trade Commission Act may be taken as the prototype, the courts have declined to issue injunctions even without explicit withdrawal of that jurisdiction, and have required that resort be had to the exclusive forum provided by law. E. g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

3. Objection is made to certain features of the procedure which has been provided. Principally the attack is directed at the provisions which prohibit stays and interlocutory injunctive orders, for the purpose of maintaining continuity of price control pending completion of the statutory review

proceedings. Appellants, however, have not been injured by the stay provisions since they have not sought redress by application to the Administrator and the Emergency Court of Appeals. Cf. *Anniston Manufacturing Co.* v. *Davis*, 301 U. S. 337. Moreover, a stay is not a matter of absolute right under the Constitution. See *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 10. In the present statute Congress has generalized what would undoubtedly have been proper judicial practice governing the issuance or denial of stays, since that practice gives special weight to the public interests affected. The principle that vital public interests will not be set at naught by the granting of interlocutory relief in the absence of overwhelming private need finds its most frequent application in cases involving property rights. See *Phillips* v. *Commissioner*, 283 U. S. 589, 595.

The decision in *Ex parte Young*, 209 U. S. 123, and the cases which have followed it, are not opposed to our position. In the first place, in holding that there was a right to a stay of penalties threatened by criminal prosecutions those cases emphasized the fact that the statutes under consideration provided no method of challenge save by defending in criminal actions, and where violations of the statute would subject the individual to oppressive penalties all effective avenues of redress were blocked. See *Wadley Southern Railway* v. *Georgia*, 235 U. S. 651, 662. In the

present Act orderly challenge may be made by administrative protest and judicial review. Moreover, for the most part the cases relied on by appellants involved the element of continuing confiscation in relation to public utility regulation. In the present case there is no constitutional right that regulation under the war powers shall yield a fair return to those regulated. Finally, it would be wholly incompatible with the functioning of the price control law to follow the practice pursued in public utility cases. The giving of a bond, for example, would not serve to protect against the evils of inflation.

It may be observed that in the case of revocation of licenses, not involved here, the statute requires a judicial order and makes provision for stays. Compare *Porter* v. *Investors Syndicate*, 286 U. S. 461; *id.*, 287 U. S. 346.

4. Objection is also made to that feature of the procedure which bars consideration of the validity of price regulations, as distinguished from the validity of the Act itself, in suits to enforce the Act, and which grants exclusive authority in that regard to the Emergency Court of Appeals. Apart from the fact that this statutory allocation of functions may be challenged in the criminal enforcement proceedings themselves, the objection is not well founded. The provision in question establishes the proper consequence of a failure to exhaust administrative remedies. Where there has been such failure the defense of

invalidity of the regulation may not be open even in criminal proceedings. *Bradley* v. *City of Richmond*, 227 U. S. 477; cf. *United States* v. *Corrick*, 298 U. S. 435.

The foregoing considerations are sufficient to dispose of appellants' contention that the procedural provisions are an invalid abridgment of the judicial power.

II

Even apart from the express statutory withdrawal of jurisdiction in the court below, the bill would not present a case within the equity jurisdiction of the court. An injunction will not be granted to restrain a pending criminal prosecution, particularly where the very procedural objections urged may be made matters of defense. Cf. *In re Sawyer*, 124 U. S. 200. With respect to the threats of future prosecutions, equitable intervention is likewise unjustified. There is no occasion for enjoining the imposition of penalties, however substantial, where the validity of the statute may be challenged through administrative and judicial remedies. As has been stated above, there are no features of that administrative and judicial procedure which render it invalid so as to dispense with recourse to it.

The present case illustrates with special force the inappropriateness of injunctive proceedings. The damage which appellants assert is not damage resulting from the specific maximum price regulation which they have violated and for the violation

of which prosecutions are pending, but it is damage asserted to result from a shortage of supplies caused by the imposition of price ceilings on appellants' suppliers, the packers, who are said thereby to have limited their purchases from livestock producers. Moreover, even if appellants were permitted to sell at prices in excess of those fixed for them as wholesalers, it does not follow that retail dealers would be in a position to purchase at the increased prices, in view of the ceilings on retail sales. It is evident that what appellants must seek, on their own showing, is a readjustment of price regulations as applied to a series of transactions involving others who are not parties to the proceeding and whose interests can most appropriately be considered in relation to that of appellants in the administrative proceedings made available by the Act.

ARGUMENT

I

THE COURT BELOW PROPERLY DISMISSED THE BILL IN RECOGNITION OF THE EXPRESS WITHDRAWAL OF ITS JURISDICTION EFFECTED BY SECTION 204 (d) OF THE EMERGENCY PRICE CONTROL ACT

A. THE STATUTORY PROCEDURE AND THE CONSIDERATIONS IMPELLING ITS ADOPTION

The jurisdiction of the court below to entertain this suit has been expressly withdrawn by act of Congress. The suit is one to enjoin enforcement of Maximum Price Regulation No. 169, as

originally issued and as revised pursuant to section 2 (a) of the Emergency Price Control Act. Sections 203 and 204 of the Emergency Price Control Act establish an exclusive statutory procedure for administrative reconsideration and judicial review of maximum price and rent regulations issued pursuant to section 2 of the Act. As the exclusive judicial forum under this statutory plan a new court of the United States, the Emergency Court of Appeals, is created by section 204 (c) of the Act. Its judgments are made reviewable by writ of certiorari in this Court. In order to preserve the exclusive purview thus reserved to the Emergency Court of Appeals and to this Court, section 204 (d) of the Act expressly withdraws competing jurisdiction from all other courts. An exclusive method has thus been provided in the Act whereby any person subject to a price or rent regulation, having first pursued the administrative remedies provided by the statute, may institute proceedings for injunctive relief from the regulation in the Emergency Court of Appeals, with final review by this Court.

Section 204 (d) further provides that no court outside the exclusive statutory forum shall have jurisdiction or power "to stay, restrain, enjoin, or set aside" any price or rent regulation or any provision of the act authorizing the issuance of such regulations, or "to restrain or enjoin the enforcement" of such regulations.

Thus, in seeking to have the court below enjoin the enforcement of Maximum Price Regulation No. 169 appellants were asking that the court assume to exercise a jurisdiction which Congress has expressly denied to it. The court properly refused this invitation, and rejected appellants' contention that section 204 (d), in thus barring the present suit, is unconstitutional. It is submitted that the decision reached below was correct.

The statute and implementing regulations which have been issued pursuant to it [1] afford to aggrieved persons full opportunities for administrative and judicial relief. In addition to the remedy expressly provided in the statute authorizing "protests" against a regulation, addressed to the Administrator with judicial review in the Emergency Court of Appeals and this Court (Sections 203, 204), the Administrator has also established procedures for the granting of special "adjustments" as authorized by the Act (Sections 2 (c), 201 (d)), and for the granting of petitions for amendment of regulations.[2] A denial by the Administrator of a protest or an application for adjustment is reviewable by the Emergency Court of Appeals upon filing of a complaint in that Court

[1] Revised Procedural Regulation No. 1, 7 F. R. 8961; see also Section 1364.410 of Maximum Price Regulation No. 169.

[2] The petition for amendment is an additional remedy afforded by the Administrator and not required by the Act. Such a petition is addressed to the Administrator's "legislative" discretion.

pursuant to the provisions of Section 204 (a) of the Act. Final review may thereafter be had in this Court by writ of certiorari (Section 204 (d)). The Emergency Court of Appeals is vested with full authority to set aside any regulation or order which is shown to be "not in accordance with law, or * * * arbitrary or capricious". (Section 204 (b)). It also possesses power, of course, to pass upon any proper challenge to the constitutionality of the Act itself.[3] Appellants' contention that the Emergency Court of Appeals may pass only upon regulations, and not upon the Act itself, is incorrect. The Emergency Court of Appeals exercises the judicial power of the United States in reviewing the Administrator's determinations. Except for the restrictions as to issuance of interlocutory orders, it exercises the full powers of a district court of the United States, with respect to the jurisdiction conferred by the Act (Section 204 (c)).

Directly in issue in the present case is the provision of Section 204 (d) forbidding any court other than the Emergency Court to enjoin the enforcement of price control orders. Indirectly involved, if it is thought necessary to consider the

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[3] The report of the Senate Banking and Currency Committee, favorably reporting these provisions, stated (77th Cong., 1st Sess., S. Rep. 931, p. 25): "Of course, the courts in which criminal or civil enforcement proceedings are brought *have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself.*" (Italics supplied.)

provisions for administrative and judicial review, are the provisions that the validity of price regulations (as distinguished from the statute) shall not be considered in suits to enforce the Act (section 204 (d)), that no interlocutory relief shall be had in the Emergency Court (section 204 (c)), and that regulations set aside by that court shall remain in force pending review by this Court (section 204 (b)).

These provisions are parts of a unified statutory plan. They are designed for the protection of the nation against the perils which inhere in delay, premature interruption, or non-uniform application of inflationary controls in wartime. Before considering the precedents which support their validity, we shall recount briefly the considerations which impelled their enactment and which demonstrate their function in the control of wartime inflation.

The need for continuity of control.—There will be no challenge, we are confident, of the judgment embodied in the Emergency Price Control Act that effective control of price inflation is a matter of the most urgent necessity for a nation at war today.[4] Effective control is difficult in part because the incidents of price inflation are as manifold and as widespread as the business transactions which take place each day in the economic

[4] See Message of the President, July 30, 1941, 87 Cong. Rec. 6457, H. Rep. 1409, 77th Cong., 1st Sess.

life of a large industrial nation. The chief difficulty arises, however, from the cumulative and irremediable character of price inflation. An inflationary incident is virtually impossible to undo, because its consequences are rapid and pervasive. The only effective way to control inflation with respect to particular commodities is to control it uniformly, without delay, and without interruption.

If preliminary or final injunctions or other paralyzing orders interfering with the present controls could be secured in various judicial districts throughout the country, and if premature relief could be secured in the statutory forum, the purposes of the Emergency Price Control Act would be nullified. Persons or localities benefitting by such adjudications in the regularly established courts of the country would be freed from the obligation to comply with regulations while others still had to obey. Such inequality in the operation of the statute would naturally create a sense of injustice in the community, would militate against popular acceptance of the statute, and would make its proper enforcement more difficult. More than this, however, such uneven and haphazard operation of the statute would carry a threat of serious damage to the domestic economy. The sudden development of price disparities entirely unrelated to natural geographical differentials would disrupt normal market relationships. Commodities would tend to be drained off toward the areas in which higher

prices prevailed. Producers in lower-price areas would be at a serious disadvantage in procuring goods at the price established by the regulations. The disruption would be the more acute because of wartime shortages in many commodities.

Similarly, premature orders in the statutory forum itself, suspending the effectiveness of regulations throughout the country in advance of a final decision on their validity, would defeat expeditious and fair methods of regulation. If a price regulation did not have to be obeyed during the period between its original promulgation and final judicial determination of its validity, many persons would find it more profitable to make the fullest use of the law's delays rather than to take advantage of the opportunities provided by the statute for a speedy decision. The consequences of any prolonged suspension of regulations might be disastrous and would be irrevocable.

It is evident, then, that control of price inflation in wartime, perhaps unlike other kinds of governmental regulatory action, cannot accomplish its purpose unless it is effective from the very outset and continues to be effective while normal administrative remedies are being applied and the fullest judicial consideration of the program is being completed. No bond or deposit in court could safeguard the incalculable values both public and private which are at stake when inflationary controls are challenged in wartime. No price

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can be placed upon military need and national morale. Congress recognized in this Act that the national safety demands continuity of price control until, in pursuance of an orderly course of proceedings, the decision of the highest court of the land has been had upon the questions of law involved.

The need for a simplified enforcement mechanism.—The need for simplified enforcement in aid of wartime price controls is apparent. Maximum price regulations affect millions of persons. Unless effective enforcement measures are available, a price control program cannot long proceed successfully. If, in every suit to enforce compliance with the regulations, the Government were under an obligation to present the mass of economic data which might be required to establish the validity of the regulation, and to meet the evidence and arguments which might be presented by each defendant, the already great difficulties of enforcement might well become insuperable. Congress in adopting the review provisions of this Act had before it the discouraging history of delay in the litigation of public utility rate cases. See Mr. Justice Brandeis, concurring; in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, at 84–88; Mr. Justice Black, dissenting, in *McCart* v. *Indianapolis Water Co.,* 302 U. S. 419, 435–436. The technical and complex economic questions involved in challenges to the validity of price regulations have accordingly been reserved

by Congress for consideration in orderly proceedings before a specially constituted tribunal which can act on a proper administrative record, can develop the essential expertise for a fair, well advised, and expeditious appraisal of the regulations, and can build up the necessary uniformity in standards of review. The Emergency Court of Appeals thus enjoys the advantage of a continuous and concentrated experience in disposing of these important controversies. It can render its decisions upon a comprehensively informed basis and with proper recognition of national aspects.

The need for administrative flexibility.—Thousands of persons are often affected by the establishment of a single price ceiling. Careful investigation prior to the issuance of a regulation will have brought the general economic considerations to the attention of the Administrator. No amount of preliminary economic survey, however, can bring to the attention of the Administrator all of the significant facts in the situation and all of the ways in which the regulation will affect the persons subject to it. The unique problems of particular business units can only be known if they bring their cases to the attention of the Administrator and advise him of the facts. Often there is no occasion for controversy between persons subject to a regulation and the Administrator, but merely the need for an opportunity to present significant and relevant facts to the Administrator. Precision in adjustment or modi-

fication of a regulation is only possible within the framework of the administrative processes. The agency which establishes the regulation is in the best position to make a thorough and complete reexamination of the considerations which led to the issuance of the regulation in its original form.

In contrast with the flexibility of the administrative remedy is initial judicial determination of the validity of a maximum price regulation. A court in passing upon the validity of a particular regulation would be limited to a finding that it is either valid or invalid. It could not make the adjustments or modifications appropriate for a particular case. If a maximum price of 10 cents per pound is judicially determined to be invalid, the result would not be that a maximum of 11 cents would be substituted; the seller would be free to sell at any price the traffic would bear. Instead of flexible but secure control of prices, the result would be absolute release of control for a period.

That the considerations outlined above dictated the adoption of these provisions by Congress is amply shown by the legislative history of the provisions, as set forth in the accompanying footnote.[5]

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[5] The following excerpts are from the report of the Senate Banking and Currency Committee, recommending adoption of the provisions (77th Cong., 1st Sess., S. Rep. No. 931, pp. 23, 24–25):

"* * * In keeping with the emergency character of the regulations and orders of the Administrator issued under section 2 of the bill, and to expedite action affecting the

The instant suit illustrates the needs which Congress had in view when it passed this Act. An important group of wholesale dealers in meat, a

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validity of such regulations or orders without overburdening the regular courts and judges, exclusive jurisdiction to determine the validity of any such regulation or order is vested in an Emergency Court of Appeals created under section 204 (c) of the bill, and upon review of judgments or orders of such Emergency Court, in the Supreme Court of the United States. * * *

"The Emergency Court of Appeals is given exclusive jurisdiction to set aside, in whole or in part, any regulation or order under section 2, to dismiss the complaint, or to remand the proceedings, and all the powers of a district court are conferred upon it with respect to this jurisdiction, except the power to issue interlocutory orders staying the effectiveness of any such regulation or order (p. 23).

* * * * * * *

"The bill contains provisions necessary to insure that price control administration will not be paralyzed by preliminary injunctions, interlocutory restraining orders, or stays. The Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court, are granted exclusive jurisdiction under section 204 (d) to determine the validity of any regulation or order issued under section 2 or of any price schedule effective under the provisions of section 206. If the judgment of the Emergency Court is to enjoin or set aside, in whole or in part, any such regulation or order, the effectiveness of such judgment is postponed under section 204 (b) until after 30 days from the entry thereof. This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court.

food not less scarce than vital in the present emergency, are dissatisfied with the maximum price regulation applicable to their business. Under the statute methods are provided whereby these objections could be disposed of in an orderly manner

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"Section 204 (d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity, constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself (pp. 24–25).

The following excerpt from the hearings on the bill is also pertinent:

"Mr. GINSBURG. The bill [as originally passed by the House] further omits provisions with regard to a stay. In our bill—and I believe in the bill proposed by Senator Taft—the price remains in effect while it is being reviewed by the courts. The idea is that if the price could be stayed while it is being reviewed by the courts, there would be no possibility of price control in the interval.

"The House Bill omits the stay provision. It permits diversity of decision and review by 11 different courts. In some circuits the price could go up because the price fixed by the Administrator or the Board is no longer in effect; in other circuits, where there have not been any appeals, the price would remain fixed.

"Senator TAFT. There should be no stays. (Hearings before the Committee on Banking and Currency, Senate, 77th Cong., 1st Sess., H. R. 5990, pp. 146, 147)."

without violent dislocations—without subjecting the public to the hardships of a reduced supply of meat or excessive meat prices, and without involving the dissatisfied meat dealers in prosecutions for breaking the law. The dealers, however, have not pursued their statutory remedy and have invited criminal prosecutions by violating the price regulation.[6] Finally, they have now attempted to thwart these prosecutions by invoking a forbidden jurisdiction in the Court below to have the entire statute declared unconstitutional and to have enforcement of the statute ended by a sweeping injunction.

If the events described should establish a model for other persons subject to maximum price regulations the price control program would collapse. The provisions of the Act which provide for exclusive jurisdiction and prevent the issuance of premature stays are intended to avert this danger and at the same time afford to aggrieved persons an appropriate avenue of relief.[7]

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[6] The initial statutory 60-day period provided in section 204 (a) for filing of protests against Revised Maximum Price Regulation No. 169 (7 F. R. 10381), expired on February 14, 1943. The indictments against appellants were handed down on February 9, 1943. Appellants have not attempted to file protests on new grounds arising after the initial 60-day period, as they are entitled to do under section 204 (a) upon a proper showing that such new grounds have in fact arisen.

[7] We indicate in Point II, *infra* (pp. 65–67), some of the features of the present case which make injunctive relief particularly inappropriate.

B. THE PROVISIONS OF SECTION 204 (d) WHICH WITHDRAW JURISDICTION FROM THE COURT BELOW TO ENJOIN ENFORCEMENT OF MAXIMUM PRICE REGULATIONS ARE CONSTITUTIONAL

That the exclusive jurisdiction provisions of the Emergency Price Control Act are indispensable parts of a statute enacted under the war powers of Congress and are essential to the effective operation of wartime price control is, we submit, sufficient to establish their validity. In exercising these powers for the control of prices in wartime, the choice of measures and procedures to make that control effective is a necessary part of the Congressional authority. The war power of the Federal Government "is a power to wage war successfully." *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 426; see also *Stewart* v. *Kahn,* 11 Wall. 493, 506; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 163.

More particularly, however, the statutory prohibition against injunctive relief in any court save the Emergency Court of Appeals is unquestionably a valid exercise of Congressional control over the jurisdiction of the inferior federal courts, as that prohibition comes into force in the present case. In numerous decisions, of which *Kline* v. *Burke Construction Company,* 260 U. S. 226, may be taken as typical, this Court has affirmed the proposition that the lower federal courts are dependent for their jurisdiction entirely upon acts of Congress and that there is no constitutional right that Congress shall provide ac-

cess to the federal courts in particular classes of cases. Throughout our history Congress has exercised control over the jurisdiction of the lower federal courts, frequently in relation to legislative policies of a broad nature. Congress has set up and abolished special courts, such as the old circuit courts and the Commerce Court,[8] has raised the threshold jurisdictional amount,[9] and has on occasion withdrawn jurisdiction over pending cases.[10]

In *Cary* v. *Curtis*, 3 How. 235, the Court upheld a statute prohibiting suits in assumpsit against collectors of customs, as against the contention that the statute was repugnant to the Constitution because it debarred citizens from the right to resort to the courts for redress of common law wrongs. The decision was rested on the alternative grounds of sovereign immunity and the authority of Congress under Article III of the Constitution (pp. 244–245).

The withdrawal of authority to grant injunctive relief in certain classes of cases is a familiar form of Congressional control. Section 3224 of the Revised Statutes is perhaps the most frequently invoked of these prohibitions. While the Court has

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[8] 36 Stat. 1087, 1167; 38 Stat. 219.

[9] 24 Stat. 552; 36 Stat. 1091.

[10] See, e. g., *Ex parte McCardle*, 7 Wall. 506, 515; *Smallwood* v. *Gallardo*, 275 U. S. 56.

Statutes regulating the jurisdiction of the lower federal courts are collected in 37 Harv. L. Rev. 1059, App. I.

occasionally divided on the question whether "exceptional circumstances" will take a case out of the prohibition against injunctions to restrain the collection of federal taxes, the division has turned on the meaning of the statute and not on constitutional power. Cf. *Miller* v. *Standard Nut Margarine Company*, 284 U. S. 498. Similarly, the Norris-LaGuardia Act has frequently been applied both by the lower federal courts and by this Court to prohibit injunctive relief against certain forms of labor activities. In *Lauf* v. *Shinner & Co.*, 303 U. S. 323, this Court reversed a decree granting injunctive relief where findings required by the statute had not been made, even though the findings which were made, of irreparable injury and lack of remedy at law, are traditionally deemed sufficient for equitable relief. The Court said (p. 330):

> There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States. * * *

In the present statute Congress has exercised its control more narrowly, in that it has not withdrawn injunctive power from the federal courts but has distributed that power by making it the function exclusively of the Emergency Court of Appeals. This precise form of statutory procedure is, of course, not a novelty. Since the legislation creating the Federal Trade Commission in 1914, provision for exclusive judicial review in one class of courts has been incorporated into most federal statutes deal-

ing with administrative regulation.[11] These statutes commonly provide for an exclusive mode of review without explicit withdrawal, as in the present statute, of the injunctive power from other federal courts. Nevertheless, it has been recognized that even without such explicit provision the exclusive procedure carries with it as a necessary corollary the denial of injunctive powers to other federal courts. See, e. g., *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. At the time of the decision in the *Myers* case the validity of the National Labor Relations Act had been determined. In a case arising under the Federal Alcohol Administration Act it was held that the same rule was to be applied even though the validity of the act had

[11] Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U. S. C. Sec. 45 (c) (d); Packers and Stockyards Act, 1921, 42 Stat. 162 (1921), 7 U. S. C. Sec. 194; Securities Act of 1933, 48 Stat. 80 (1933), 15 U. S. C. Sec. 77i; Securities Exchange Act of 1934, 48 Stat. 901 (1934), 15 U. S. C. Sec. 78y; Public Utility Holding Company Act of 1935, 49 Stat. 834 (1935), 15 U. S. C. Sec. 79x; Federal Power Act, 49 Stat. 860 (1935), 16 U. S. C. Sec. 825l; National Labor Relations Act, 49 Stat. 454 (1935), 29 U. S. C. Secs. 160 (e) (f); Bituminous Coal Act of 1937, 50 Stat. 85 (1937), 15 U. S. C. Secs. 836 (b) (c) (d); Fair Labor Standards Act of 1938, 52 Stat. 1065 (1938), 29 U. S. C. Sec. 210; Agricultural Adjustment Act of 1938, 52 Stat. 63, 64 (1938), 7 U. S. C. Secs. 1365–1367; Civil Aeronautics Act of 1938, 52 Stat. 1024 (1938), 49 U. S. C. Sec. 646 (d); Federal Alcohol Administration Act, 49 Stat. 980 (1935), 27 U. S. C. Sec. 204h. The Communications Act of 1934, 48 Stat. 1093 (1934), 47 U. S. C. Sec. 402 (b), and the Commodity Exchange Act, 49 Stat. 1496, 1498 (1936), 7 U. S. C. Secs. 6g, 9, contain the same type of statutory review procedure but do not provide in terms that the jurisdiction of the designated review court shall be "exclusive."

not been ultimately established and was being challenged. *Arrow Distilleries, Inc.* v. *Alexander,* 24 F. Supp. 880 (District of Columbia), affirmed *per curiam,* 306 U. S. 615.

The decision of the court below, holding that it was without power to entertain the suit, is in accord with the decisions in all the other cases presenting a similar question under the Act. *Hatter* v. *Henderson,* Southern District Alabama, decided July 28, 1942, OPA Service 622:1; *Henderson* v. *Kimmel,* 47 F. Supp. 635 (D. Kan.); *Dieffenbaugh* v. *Cook,* 47 F. Supp. 645 (N. D. Ind.).

The force of the consistent holdings discussed above, sustaining Congressional withdrawals of injunctive jurisdiction, cannot be weakened by reference to dicta concerning the doctrine of separation of powers. Appellants cite only one decision of this Court setting aside an Act of Congress on that ground: *United States* v. *Klein,* 13 Wall 128; the statute there prescribed an arbitrary rule for the judicial determination of a question of fact, and in addition it infringed the executive power of pardon.

What has been said thus far is directed to the question of jurisdiction as it is presented by the application of Section 204 (d) to the present suit, one brought in a federal district court. The withdrawal of injunctive power by the Act is, of course, broader, and extends to state courts as well, in order to preserve the exclusive authority of the Emergency Court of Appeals. Thus the

withdrawal of injunctive power is part of a coherent procedural system. In the next succeeding portions of the brief we turn to a consideration of the other features of that system, which afford administrative and judicial review to aggrieved persons and certain aspects of which are attacked by appellants.

C. THE PROVISIONS WHICH PROHIBIT STAYS AND INTERLOCUTORY INJUNCTIVE ORDERS FOR THE PURPOSE OF MAINTAINING CONTINUITY OF PRICE CONTROL PENDING COMPLETION OF STATUTORY REVIEW PROCEEDINGS ARE CONSTITUTIONAL.

Appellants, in addition to complaining of denial of access to the district courts, complain also of the accompanying provision denying stays in the statutory review forum (sections 204 (b), 204 (c)). Attack is thus made upon the provisions of the Act which insure the continuity necessary for success of the present wartime price controls.

The provisions assailed are an indispensable part of a statute which rests on the war powers of Congress. We have pointed out above (see pages 15–18, *supra*) that these provisions are essential because the principal difficulty in dealing effectively with wartime price inflation arises from its "runaway" or "spiral" character. Delayed or interrupted control is futile. The harm done to the public interest by a release of control could not be guarded against by any bond or deposit. Appellants' assertion that they will suffer loss under this statute cannot outweigh the overwhelming considerations on the side of the public. The

validity of the denial of stays in this Act rests, then, primarily upon the war powers of Congress. Further, however, it is submitted (1) that appellants cannot attack the stay provisions because they have not been injured by them; and (2) that there is no constitutional right to a stay.

1. *Appellants Have Not Been Injured by the Stay Provisions*

Appellants have not been injured by the provisions of the statute denying them access to the district courts or by those which preserve the continuity of price regulations in the statutory forum, because they have not gone into the administrative forum provided in section 203 of the Act and in the implementing regulations. By applying for administrative reconsideration appellants might have obtained complete relief in the form of a substantive order or amendment which would have been the equivalent of a stay. There would then have been no need for a judicial stay or for this action.

It is well established that persons may not challenge a statutory procedure which they have declined to pursue and whose untried incidents cannot properly form the subject of collateral inquiry or attack. *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337, 354–355; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 554; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 542, 544–545; *Melton* v. *Railroad Commission of Texas,* 10 F. Supp. 984,

985-986 (W. D. Tex. 1935). Cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 293–294 (dissent). Before appellants can complain that they are hurt by the provisions of the statute denying them judicial stays, they are under a duty to show that they have made an effort under the statutory procedure to obtain administrative relief which might have obviated the need for such a stay.

2. *A Stay is not a Matter of Absolute Right Under the Constitution*

As this Court recently had occasion to declare in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, there is no absolute right to a stay pending judicial review of legislative or administrative enactments; the right to such a stay is never recognized where the public interest demands otherwise. The Court said, (p. 10):

> A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.*, 147 U. S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case. *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672–73; * * *.

The question before the Court in that case was whether Congress intended to authorize stays in a certain class of proceedings for judicial re-

view of orders of the Federal Communications Commission. The statute was construed as authorizing stays. Neither the majority nor the dissenting opinion treated the question on any level save that of Congressional intention. In the case at bar the answer is not in doubt. This Court indicated the answer when, in the *Scripps-Howard* case, it adverted to the present Act and declared that Congress "knew how to use apt words" (316 U. S. at 17) to express its command that the present wartime price controls shall remain immune against judicial stays.

The recognition in the *Scripps-Howard* case that stays are not a matter of absolute right and may be subject to Congressional control in the public interest is in accord with the well-established principle that the courts themselves do not permit stays in situations involving some object of paramount public concern. The rule traditionally followed in such cases is that the "balance of convenience" between the parties must condition the granting of a stay. Frequently granted in suits between private parties, stays even in that class of suits are not absolutely guaranteed because the right is qualified by two conditions: first, it must appear that the rights of the party to be aided will suffer heavily if relief is denied; but, second, it must also appear that the rights of the party to be enjoined will not be seriously injured in the meantime or can be protected by the posting

of financial security. That the first of these conditions is met is not enough; the second must also be met.[12]

When a suit between private parties is one involving a matter seriously affecting the public interest,[13] and, *a fortiori,* when a governmental entity

[12] In the following private cases relief was denied under this rule: *Kryptok Co.* v. *Stead Lens Co.*, 190 Fed. 767 (C. C. A. 8th, 1911); *Shubert* v. *Woodward*, 167 Fed. 47 (C. C. A. 8th, 1909); *Green* v. *Gravatt*, 19 F. Supp. 87 (W. D. Pa. 1937); *International Film Service Co.* v. *Associated Producers*, 273 Fed. 585 (S. D. N. Y. 1921); *DeKoven* v. *Lake Shore & M. S. Ry. Co.*, 216 Fed. 955 (S. D. N. Y. 1914); *Napier* v. *Westerhoff*, 138 Fed. 420 (C. C. S. D. N. Y. 1905); *Gring* v. *Chesapeake & Delaware Canal Co.*, 129 Fed. 996 (C. C. Del. 1904), *affirmed*, 159 Fed. 662 (C. C. A. 4th, 1908), certiorari denied, 212 U. U. S. 571; *Amelia Milling Co.* v. *Tennessee Coal, Iron & R. Co.*, 123 Fed. 811 (C. C. Ga. N. D. 1903); *Day* v. *Candee*, Fed Cas. 3676 (C. C. Conn. 1853). In the following private cases relief was given under the rule: *Selchow & Righter Co.* v. *Western Printing & Lithographing Co.*, 112 F. (2d) 430 (C. C. A. 7th 1940); *Phillips v. Sager*, 276 Fed. 625 (App. D. C. 1921); *Chew* v. *First Presbyterian Church of Wilmington, Del., Inc.*, 237 Fed. 219 (Del. 1916); *Colgate* v. *James T. White & Co.*, 169 Fed. 887 (C. C. S. D. N. Y. 1909); *Harriman v. Northern Securities Co.*, 132 Fed. 464 (C. C. N. J. 1904), reversed, 134 Fed. 331 (C. C. A. 3rd, 1905); affirmed, 197 U. S. 244; *Cohen* v. *Delavina*, 104 Fed. 946 (C. C. Maine 1900).

[13] *E. g. Stein* v. *Bienville Water Supply Co.*, 32 Fed. 876 (C. C. S. D. Ala. 1887), denying an injunction *pendente lite* as between private parties where the pubic water supply of a city was involved. The public interest was also a ground for denial of relief as between private parties in *Marconi Wireless Telegraph Co.* v. *Simon*, 227 Fed. 906 (S. D. N. Y. 1915). See *Gulf, M. & N. R. Co.* v. *Illinois Cent. R. Co.*, 21 F. Supp. 282 (W. D. Tenn. 1937).

or agency is directly involved as a party in a suit, this rule achieves the status of a virtual bar against stays.[14] See *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338. If a stay is granted in such a suit against a public agency, it is strictly conditioned upon the posting of a bond or other security to protect the public interest.[15] Cf. *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43, 51. If no bond is required it is because the subject matter is such that the court can exercise a preservative control

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[14] E. g. *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. (2d) 885 (C. C. A. 6th, 1937), certiorari denied, 301 U. S. 710; *Railroad Commission of Alabama* v. *Central of Georgia Ry. Co.*, 170 Fed. 225 (C. C. A. 5th, 1909), certiorari denied, 214 U. S. 521; *Pope* v. *Blanton*, 10 F. Supp. 18 (N. D. Fla. 1935); *Dryfoos* v. *Edwards*, 284 Fed. 596 (S. D. N. Y. 1919), affirmed, 251 U. S. 146, 264; *Hannah & Hogg* v. *Clyne*, 263 Fed. 599 (N. D. Ill. 1919); *F. W. Cook Brewing Co.* v. *Garber*, 168 Fed. 942 (C. C. M. D. Ala. 1909). *See* Hughes, *Federal Practice*, Sec. 1023; Nichols, *Cyclopedia of Federal Procedure*, Sec. 3210; McKean, *The Balance of Convenience Doctrine*, 39 Dickinson L. Rev. 211 (1935).

[15] *Magruder* v. *Belle Fourche Valley Water Users' Ass'n.*, 219 Fed. 72 (C. C. A. 8th, 1914); *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 Fed. 821 (C. C. A. 8th, 1911), certiorari denied, 220 U. S. 618; *Menominee & Marinette Light & Traction Co.* v. *City of Menominee*, 11 F. Supp. 989 (W. D. Mich. 1935); *Birkheiser* v. *City of Los Angeles*, 11 F. Supp. 689 (S. D. Cal. 1935); *Joplin & P. Ry. Co.* v. *Public Service Commission of Missouri*, 267 Fed. 584 (W. D. Mo. 1919); *Contra Costa Water Co.* v. *City of Oakland*, 165 Fed. 518 (C. C. N. D. Cal. 1904); *San Joaquin & Kings River Canal & Irrigation Co.* v. *Stanislaus County*, 163 Fed. 567 (C. C. N. D. Cal. 1908); *Indianapolis Gas Co.* v. *City of Indianapolis*, 82 Fed. 245 (C. C. Ind. 1897). Cf. *United States* v. *Dominion Oil Co.*, 241 Fed. 425 (S. D. Cal. 1917). See *Pacific Live Stock Co.* v. *Lewis*, 241 U. S. 440.

over it *pendente lite*.[16] But when the case is one where the public interest is substantial and connot be protected by bond or otherwise the courts are emphatic in rejecting petitions for interlocutory relief.

Thus, in *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. (2d) 885 (C. C. A. 6th, 1937), certiorari denied, 301 U. S. 710, the circuit court of appeals reversed an order of the lower court entering an interlocutory injunction against the Tennessee Valley Authority. The court said (p. 894):

> Without denying that some injury may be suffered if the injunction is lifted, it does not so clearly appear that it will of necessity overbalance the injury which must inevitably be suffered by the defendants and the public.
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> * * * To appraise the injury to the defendants from the disorganization which must follow substantial or even partial cessation of activity is impossible, but that it will be great cannot be denied. So also in respect to the public interest involved. The loss, inconvenience, and discomfort of the residents of the area in failing to obtain cheap electric energy, if it be found in the end that it may lawfully be supplied to them, may likewise not be measured, but equally incontrovertible is it that it will be

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[16] Cf. *In re Arkansas Railroad Rates*, 168 Fed. 720 (C. C. E. D. Ark. 1909); *Buffalo Gas Co.* v. *City of Buffalo*, 156 Fed. 370 (C. C. W. D. N. Y. 1907).

great. In so far, also, as restraint will delay effective control of the flood waters of the Tennessee river and its tributaries, the public interest in the achievement of that objective is similarly beyond appraisal. Human experience of the catastrophic effect upon great areas of overflowing rivers is too recent and too painful to permit of any doubt either as to the existence or extent of the public interest that is threatened by the maintenance of the injunction, and against which the threat to private interests must be balanced. From such possible injury, it is clear no bond can adequately safeguard the public interest.

In *Dryfoos* v. *Edwards,* 284 Fed. 596 (S. D. N. Y. 1919), affirmed, 251 U. S. 146, 264, a temporary injunction against the World War Prohibition Act was refused. The court stated (p. 603):

* * * The damage done by an injunction meanwhile cannot be measured in money, as in the case of *Cotting* v. *Kansas City Stockyards,* (C. C.) 82 Fed. 857. Here is a question of national public policy, of allowing the sale of what the constituted authorities apparently regard as injurious to the public, or to so much of it as they have the right to consider. To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not * * *.

Cf. *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 222–223. An application of the balance of convenience rule was also made under the District of Columbia World War Rent Law (the "Ball Act").[17] In *Block* v. *Hirsh*, 256 U. S. 135, rejecting the contention that a wartime rent control law allowing tenants to remain in possession at the existing rentals pending judicial review was unconstitutional, Mr. Justice Holmes, speaking for the Court, declared (pp. 157–158):

> The preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law.

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[17] Section 110 of the Ball Rent Act, 41 Stat. 298 (1919), provided that rent determinations by the statutory commission should remain in full force and effect pending the final decision on appeal. This provision was applied in *Porter* v. *Gardner*, 277 Fed. 556 (App. D. C., 1922).

A similar provision is found in the wartime National Prohibition Act of 1919, Sec. 5, 41 Stat. 310. The Act provided that upon judicial review of orders of the Commissioner of Internal Revenue revoking permits to deal in liquor for non-beverage purposes, the permit should remain revoked pending judicial review. The provision was upheld in *Cyran* v. *Blair*, 16 F. (2d) 279 (N. D. Ill., 1926); *Spartan Mfg. Co.* v. *Campbell*, 40 F. (2d) 745 (E. D. N. Y. 1930); *Rondinella* v. *Campbell*, 40 F. (2d) 746 (E. D. N. Y. 1930); *Triborough Chemical Corp.* v. *Doran*, 36 F. (2d) 496 (E. D. N. Y. 1929). See *Liscio* v. *Campbell*, 34 F. (2d) 646 (C. C. A. 2nd, 1929).

These two examples of congressional denial of stays are in addition to the instance—that in the present Act—noted by the Court in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 11.

> If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

The observations of Mr. Justice Frankfurter, concurring, in *Mayo* v. *Canning Co.*, 309 U. S. 310 (1940), are applicable, *mutatis mutandis*, here. The Company had sued in the Federal district court to enjoin enforcement of a Florida statute regulating the citrus fruit industry. This Court reversed the decree granting a temporary injunction. The concurring opinion emphasized the damage done to the public interest by the granting of the interlocutory decree (pp. 319–322):

> Citrus fruit occupies a central and indeed pervasive role in the economy of Florida. That state's well-being is dependent on the cultivation of the citrus crop, its packing, transportation, financing and exportation. * * * In *Nebbia* v. *New York*, 291 U. S. 502, this Court recognized price control as one of the means open to a state for the protection of its welfare * * *
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> * * * * *
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> * * * [In this case] the [interlocutory] injunction effectively suspended the operation of the Florida law during the whole marketing season, although this Court now finds that the injunction should never have been granted.
>
> I do not believe we should now let this bill hang over next year's crop. We ought not to encourage the use of the judicial

> process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous.

The law furnishes many examples of this preference in favor of the public interest. There are numerous situations in which there is imposed a duty to obey first and litigate afterwards. The Selective Service Act is an outstanding example.[18]

The principle, however, finds its most frequent application in cases involving property rights. Mr. Justice Brandeis summarized it in *Phillips* v. *Commissioner*, 283 U. S. 589, 595: "Property rights must yield provisionally to governmental need." The opinion added (pp. 596–597):

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer* v. *United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U. S. 611, 631. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary de-

[18] Administrative appeals to the appeal boards and the President are the selectees' only remedy prior to induction since no judicial review is afforded them in advance. E g., *Petition of Soberman*, 37 F. Supp. 522 (E. D. N. Y. 1941); *Shimola* v. *Local Board No. 42, for Cuyahoga County*, 40 F. Supp. 808 (N. D. Ohio 1941).

struction of property by administrative authorities without antecedent notice or hearing. Compare *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306; *Hutchinson* v. *Valdosta*, 227 U. S. 303; *Adams* v. *Milwaukee*, 228 U. S. 572, 584. Because of the public necessity, the property of citizens may be summarily seized in wartime. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Stoehr* v. *Wallace*, 255 U. S. 239, 245; *United States* v. *Pfitsch*, 256 U. S. 547, 553. Compare *Miller* v. *United States*, 11 Wall. 268, 296; *International Paper Co.* v. *United States*, 282 U. S. 399; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481. And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. Compare *Kohl* v. *United States*, 91 U. S. 367, 375; *United States* v. *Jones*, 109 U. S. 513, 518; *Crozier* v. *Fried Krupp Aktiengesellschaft*, 224 U. S. 290, 306.

It is difficult to imagine a situation calling more strongly than the present one for the application of the rules limiting the right to a stay. It is plain where the "balance of convenience" lies. No case of private inconvenience or even hardship can be allowed to avail to disorganize the operation, delicate and precarious enough at best, of the wartime price control program before a full and orderly review has been had. As was stated by the three-judge district court in *Henderson* v. *Kimmel*, 47 F. Supp. 635, 644–645 (D. Kan. 1942):

> While the inhibition against the granting of the stay until a final decision by the Supreme Court deprives the courts of an historic power—a power as old as the judicial system of the nation, it is deprivation of jurisdiction essential to the successful operation of rent control for the reasons we have heretofore adverted to and is justified under the war power, to insure the safety of the nation and the perpetuation of our liberties. Moreover, a stay is not a matter of right, even if irreparable injury might otherwise result. It is an exercise of judicial discretion and the propriety of its issue ordinarily depends on the circumstances of each case. The considerations we have adverted to would warrant a court in denying a stay and in our judgment warranted the Congress in denying the power to grant the stay. Congress had the power to impose the duty to obey first and litigate afterwards.

Appellants specifically complain of the provision of the present Act which requires that judgments of the Emergency Court of Appeals setting aside a regulation shall not become effective until 30 days have passed or until final disposition of the matter by the Supreme Court (section 204 (b)). The Senate Committee in favorably reporting this provision explained its purpose (77th Cong., 1st Sess., S. Rep. No. 931, p. 24):

> This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modi-

fying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court.

There is nothing unfamiliar about statutory postponement of the effectiveness of judgments pending review even when the decree is one for injunction. Cf. *Federal Rules of Civil Procedure*, Rule 62, see especially subdivisions (*c*) and (*g*); 28 U. S. C., sections 350, 874. Moreover, it is not uncommon for final injunctions against a governmental entity to be stayed or postponed for very long periods, even where no appeal is in view, on the ground that the public interest so requires. Thus, in *Wisconsin* v. *Illinois*, 278 U. S. 367, while an injunction was granted against a sanitary district restraining it from diverting water from the Great Lakes for sewage disposal purposes, the decree was so framed as to allow sufficient time to the district to find some other means of disposal.

To the same effect are *Mayor and City Council of Baltimore* v. *Brack*, 3 Atl. (2d) 471 (Md., 1939); *Livezey* v. *Town of Bel Air*, 199 Atl. 838 (Md., 1938); *Board of Health of Ocean T'p* v. *White*, 110 Atl. 43 (N. J. Ct. of Errors and Appeals, 1919);

Simmons v. *Paterson*, 60 N. J. Eq. 385, 45 Atl. 995 (1900); *Bogart* v. *Walker*, 248 N. Y. Supp. 19 (1931); *Sponenburgh* v. *City of Gloversville*, 87 N. Y. Supp. 602, 96 App. Div. 157 (1904); *Sammons* v. *City of Gloversville*, 70 N. Y. Supp. 284, 34 Misc. (N. Y.) 459 (1901). See 17 Va. L. Rev. 714–715 (1931).

Cases such as *Ex Parte Young*, 209 U. S. 123, and other cases involving public utilities,[19] which may be taken as indicating that a statute denying the right to a stay is unconstitutional, are not in point. The frequent practice of granting a stay in the public utility rate cases cannot furnish a model for legislation such as the Emergency Price Control Act, where the bond or court deposit required in the rate cases would be unavailing. Moreover, the essential basis of the rule applied in the rate cases is that the compulsion upon a public utility to accept rates which may give an inadequate return and the sufficiency of which cannot be determined in advance of a protracted judicial investigation may result in a continuing "confiscation" of the utility's property, and ought not to be enforced by heavy cumulative penalties. These considerations are wholly inapplicable to the present Act.

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[19] *E. g.*, *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104; *Mountain States Power Co.* v. *P. S. Commission of Montana*, 299 U. S. 167; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196; *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43; *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290.

First, the protection which is accorded to utilities against "confiscation" of their property cannot in all instances be given to persons subject to wartime price ceilings. Utilities are few in number, usually enjoy a monopolistic position, and ordinarily must continue to render their services to the public until permission to cease is given. The primary objective in these circumstances must be a balancing of consumer and company interests which will ensure the maintenance of the essential public services furnished by utilities. The standard of fair return fills the need for some base in fixing proper rates for utility services. Under this Act, however, the considerations of public policy involved are wholly different. The primary objective of the Act is the prevention of inflation. Loss to some sellers is incidental to the accomplishment of this vital wartime purpose. The desirability of preventing such losses cannot be permitted to compromise or nullify the essential legislative objective. There is, accordingly, no place under this statute for the concept of fair return which gives rise to the problem of "confiscation" in public utility rate cases. The concept, appropriate though it may be in the public utility field, is derived by analogy from principles of eminent domain (see the concurring opinion in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 602–603, and the authorities there cited) and is wholly inappropriate to a war-

time measure for control of inflationary prices. The "just compensation" clause of the Fifth Amendment does not limit Congress in legislating for the general interest to accomplish a general object of national policy under a regulatory statute. Property rights are held subject to proper legislative regulation and any resulting loss is merely consequential or incidental injury. *Omnia Commercial Co., Inc.* v. *United States*, 261 U. S. 502; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Block* v. *Hirsh*, 256 U. S. 135; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

Second, it would be incompatible with the functioning of the price control law to follow the practice of granting stays as in public utilities cases during the necessarily protracted judicial hearings required for determination of the reasonableness of fixed rates. Speed is frequently the controlling consideration in the issuance of a price regulation. Protracted formal hearings, whether at the administrative or judicial stage, would postpone the effectiveness of regulations until a threatened price or rent increase had already materialized and had already worked its destruction in the familiar pattern of the inflationary spiral. It is noteworthy that, during the consideration of the various price control bills, Congress, in addition to its recognition that judicial stays must be prevented (see pp. 20–22, *supra*), squarely rejected

the proposition that formal administrative hearings be required before the issuance of price regulations.[20] The legislative history indicates recognition of the fact that, in a war economy, effective price control cannot wait upon formal hearings.[21] Immediate action often becomes necessary because of sudden changes, wrought by governmental decree or fortunes of war, in conditions of supply or demand. Too often prolonged consideration of contemplated action would encourage speculative activities and render eventual control all the more difficult. Congress recognized that the plan established for the issuance and review of price regulations must not be too cumbersome to meet emergency situations.

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[20] The provisions of the bill reported by the House Banking and Currency Committee were virtually identical in this respect with the provisions of the Act. See H. Rept. No. 1409, 77th Cong., 1st Sess. (1941) 10–12; H. R. 5990, 77th Cong. 1st Sess. (1941). See also Sen. Comm. Print, Hearings before Sen. Committee on Banking and Currency on H. R. 5990, 77th Cong., 1st Sess. (1941) 72–105. The first bill passed by the House authorized the issuance of price regulations by the Administrator without prior hearing, followed by opportunity for full hearing before an administrative Board of Review while the regulations remained in effect. H. R. 5990 (in the Senate), 77th Cong., 1st Sess. (1941). The Senate rejected this. A proposal by Senator Taft to require hearings prior to the issuance of price regulations but authorizing temporary regulations without prior hearings to remain in effect for not more than sixty days was never brought to a vote. Amendment to H. R. 5990, Intended To Be Proposed by Mr. Taft, 88 Cong. Rec. (Senate), Jan. 5, 1942, at 5.

[21] See, e. g., H. Rep. No. 1409, p. 9: "The procedure governing the preparation and issuance of substantive regula-

Third, the principle of decision applied in some public utility cases, and in other types of cases, to the effect that a stay is required as a protection against excessive or cumulative penalties, is not applicable to the present Act. The rule that penalties *pendente lite* are unconstitutional and ought to be stayed if they are so excessive as to deter resort to the courts was originally developed in cases where the only means of obtaining judicial review of a statute or an administrative order was by committing a violation and awaiting prosecution. *Oklahoma Gin Co.* v. *Oklahoma,* 252 U. S. 339; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331; *Ex parte Young,* 209 U. S. 123; *Federal Trade Commission* v. *Miller's Nat. Federation,* 23 F. (2d) 968 (App. D. C. 1927); *Allen* v. *Omaha Live Stock Commission Co.,* 275 Fed. 1 (C. C. A. 8th, 1921). This condition does not obtain under the present Act, of course. Nor is the Act open to the objection that penalties are laid on the very exercise of the right of review, as in *Terral* v. *Burke Construction Co.,* 257 U. S. 529.

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tions and orders prescribing ceilings or regulating practices has necessarily been adapted to the nature of the powers granted, which involved a broad delegation of legislative power, to the fact that such regulations will apply to large numbers of persons, and to practical considerations such as the necessity for immediate action to check rapidly rising prices and the importance of avoiding speculative disturbances of the market pending the determination of a price ceiling. * * *"

It is submitted, therefore, that the stay provisions of this Act are a valid exercise of the war powers of Congress, and are fully supported by established principles of public law. These provisions are the most essential feature of the entire statutory plan of review and enforcement. They are indispensable for effective price control. Appellants' constitutional rights are in no way abridged by these provisions.[22]

D. THE PROVISION WHICH BARS CONSIDERATION OF THE VALIDITY OF MAXIMUM PRICE REGULATIONS IN SUITS TO ENFORCE THE ACT AND GRANTS EXCLUSIVE AUTHORITY IN THAT REGARD TO THE EMERGENCY COURT OF APPEALS IS CONSTITUTIONAL

Appellants complain of the withdrawal of injunctive jurisdiction from the court below on the further ground that, in accordance with the provisions of section 204 (d) of the Act, the validity of Maximum Price Regulation No. 169 may not be considered by the court in criminal enforcement proceedings and hence cannot form a ground of defense to the prosecutions.

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[22] The case of *Porter* v. *Investors Syndicate*, 286 U. S. 461, affirmed on rehearing, 287 U. S. 346, relied on by appellants, contains a dictum to the effect that a statutory denial of a stay during review of an order revoking licenses under a state Blue Sky law would abridge constitutional rights. It is submitted that the considerations set forth in the preceding pages make the language of the *Porter* case inapplicable to this wartime statute. It may also be observed that in license suspension proceedings under this Act the Administrator is not empowered to suspend, but must apply for a judicial order of suspension which may, in turn, be stayed. (Section 205 (f).)

Any objections which appellants may wish to make against this provision of the Act, or against other provisions of the Act, are fully within the power of the district court to decide in the criminal proceedings. It is thus questionable whether there is need to pass upon this objection in the present suit. In any event, the provision in question does not deprive appellants of constitutional rights.

We have previously shown (pp. 18–20, *supra*) that in connection with the plan for exclusive review of price regulations in an emergency judicial forum[22] such a restriction had to be imposed in proceedings to enforce the regulations as a necessary corollary of the grant of exclusive jurisdiction to the Emergency Court of Appeals and this Court. This provision of section 204 (d), like the bar against injunctions in the district courts, is designed to ensure that the exclusive purview reserved to the statutory forum will not be infringed by other courts. The provision constitutes a recognition by Congress of the need for uniform application and proper enforcement of wartime price controls. The provision fulfills this need by ensuring well advised judicial consideration, uniformity of judgment, and due reliance on a proper administrative record, in de-

[22] As heretofore pointed out (see p. 14, *supra*), appellants are incorrect in their contention that the Emergency Court of Appeals may pass only upon regulations and not upon the statute itself.

termining the complex questions presented by a challenge to a price regulation; and by ensuring that persons who disregard the statutory opportunities for review will not be permitted to convert prosecutions for violation of price ceilings into controversies resembling peacetime rate litigation.

Thus, the statutory ban against inquiry respecting the validity of regulations in enforcement suits is an integral part of a statutory plan adopted in furtherance of vital wartime objectives. This provision of the Act rests, therefore, like the other features of the exclusive review plan attacked by appellants, primarily on the war powers of Congress. This alone, we submit, is sufficient to establish the validity of the provision (see p. 24, *supra*, and cases there cited).

Its validity is fortified by established principles of administrative law. Even in the absence of section 204 (d) appellants would not have the right to challenge the regulation in the criminal proceedings. Appellants would be prevented from challenging the regulation in those suits as a normal consequence of their failure to exhaust their administrative remedies. In specifically compelling the same result, therefore, the Act has not deprived appellants of any rights they might otherwise have had. Any objection against the validity of the regulation is available if raised

in the appropriate manner and at the proper time.[24] The essential purpose of the rule requiring exhaustion of administrative remedies before resort to the courts—which Mr. Justice Brandeis described in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50 as a "rule of judicial administration"—is to allow the administrative body which promulgated the regulation an opportunity to consider objections to it and if necessary modify it upon full consideration of the relevant facts, accommodating the relief to the needs of the particular case. That rule, together with the rule preventing collateral attack upon administrative determinations, makes an administrative enactment unassailable in proceedings instituted to enforce it.

Thus, in *Bradley* v. *City of Richmond*, 227 U. S. 477, a defendant in a criminal prosecution for violation of an ordinance requiring private bankers to obtain licenses was held barred from challenging his administrative classification because of his failure to appear before the classifying agency. No statute required the Court to refrain from considering the validity of the administrative action; yet the Court ruled that, because the procedure established by the statute which might have afforded relief was not pursued, invalidity even on

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[24] As previously mentioned, appellants have not pursued any of the administrative remedies available to them. See p. 23, n. 6, *supra*.

constitutional grounds could not be urged as a defense in a criminal proceeding. The Court said (p. 485):

> The plaintiff in error might have appeared and shown the character and extent of the business he was doing and compared it with that of others more favored in classification. He did nothing of the kind. He seems to have stood by and let the matter of classification go by without contest. It is no answer to say that it would have been unavailing. The presumption is otherwise. The authority to classify was committed primarily to the finance committee, subject to review by the council. It was expected to use its judgment and knowledge. If it erred there was ample opportunity to show that by an appeal to the council. Of the right to appear and to be heard plaintiff in error elected not to avail himself. Under these circumstances he is not warranted in resorting to the extraordinary jurisdiction of this court to arrest an administrative error susceptible of correction by an appeal to the council.
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> * * *

In *United States* v. *Vacuum Oil Co.*, 158 Fed. 536 (W. D. N. Y. 1908) the court upheld the constitutionality of the Elkins Act (Act of Feb. 19, 1903, c. 708, sec. 1, 32 Stat. 847, 49 U. S. C. 41), which was construed to deprive a shipper of the right to contest the reasonableness of the carrier's filed rate in defending against a criminal prosecu-

tion for receiving rebates.[25] The same statute was involved in *Lehigh Valley R. Co.* v. *United States*, 188 Fed. 879 (C. C. A. 3d, 1911), a criminal prosecution for improperly cancelling demurrage charges. The defense that the demurrage rates set up by the Interstate Commerce Commission were discriminatory was held unavailable in a criminal prosecution, since the validity of the rate could be questioned only in an administrative proceeding before the Commission.

Cases under the Selective Service Act consistently hold that in a prosecution for failure to report for induction the defendant may not litigate the alleged arbitrariness or invalidity of his

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[25] The court said (p. 540):

"* * * That Congress had power under the commerce clause of the Constitution to regulate commerce is conceded, and its purpose in enacting the statute forbidding unjust discrimination and preference to the end that all shippers shall secure uniform treatment is beyond question. How this object and purpose of Congress can be effectuated if a shipper receiving rebate, concession, or discrimination is permitted to question or litigate the legality of the rate as to its reasonableness or unreasonableness in a criminal prosecution charging him with having received a concession is difficult to understand. Indeed such a construction of the act would nullify its general scope, and render its strict enforcement wholly impracticable, for juries and judges in different jurisdictions would not be likely to reach a conclusion upon the subject of just or unjust tariff charges which would secure uniformity of rates. It is therefore clear that there can be no departure or deviation from the established rates except in the manner provided by the act, and such rate must be regarded as binding upon the shipper * * *."

classification as determined by the Local Board. *Johnson* v. *United States*, 126 F. (2d) 242 (C. C. A. 8th, 1942); *United States* v. *Grieme*, 128 F. (2d) 811 (C. C. A. 3d, 1942); *Fletcher* v. *United States*, 129 F. (2d) 262 (C. C. A. 5th, 1942); *United States* v. *Bowles*, 131 F. (2d) 818 (C. C. A. 3d, 1942), certiorari granted March 1, 1943, No. 589, this term; *United States* v. *Kauten*, 133 F. (2d) 703 (C. C. A. 2d, 1943).

The rule thus forbidding collateral attack on administrative orders in criminal proceedings has, of course, likewise been applied in other types of enforcement suits. The principle requiring exhaustion of administrative remedies has equally compelling force in both civil and criminal suits. Only the method outlined in the statute for testing the validity of an administrative order may be used. Unless and until the order has been set aside in direct proceedings to challenge it, it must be observed and compliance will be enforced. This result is reached although no statute expressly commands it, and a statute which does command it is undoubtedly constitutional. *American Bond & Mortgage Co.* v. *United States*, 52 F. (2d) 318 (C. C. A. 7th, 1931), certificate dismissed, 282 U. S. 374 (1931); *United States* v. *Piuma*, 40 F. Supp. 119 (S. D. Cal. 1941), affirmed, 126 F. (2d) 601 (C. C. A. 9th, 1942); *Interstate Commerce Commission* v. *Consolidated Freightways*, 41 F. Supp. 651 (N. D. 1941). Cf. *Inghram* v. *Union Stock Yards Co.*, 64 F. (2d) 390 (C. C. A. 8th,

1933); *Forbes* v. *United States,* 125 F. (2d) 404 (C. C. A. 9th, 1942); *United States* v. *R. L. Dixon and Bro.,* 36 F. Supp. 147 (N. D. Tex. 1940); *United States* v. *Hawthorne,* 31 F. Supp. 827 (N. D. Tex. 1940), affirmed on other grounds, 115 F. (2d) 805 (C. C. A. 5th, 1940); *Harris* v. *Central Nebraska Public Power & Irr. Dist.,* 29 F. Supp. 425 (Neb. 1938).[28]

This Court has specifically declared that where rates have been established by an administrative agency, they may be challenged only in the manner prescribed by statute and that other courts may not prevent the agency from prosecuting violators. *United States* v. *Corrick,* 298 U. S. 435. In that case operators of market agencies sought to file higher rates than those prescribed by the Secretary of Agriculture for market services under the Packers and Stockyards Act of 1921, 7 U. S. C., secs. 181–229, and to restrain the Secretary from prosecuting them for charging the

[28] To the same effect are numerous State court decisions. *Town of Pittsfield* v. *Town of Exeter,* 69 N. H. 336, 41 Atl. 82 (1898); *Town of Rockingham* v. *Hood ex rel. Bank of Pee Dee,* 204 N. C. 618, 169 S. E. 191 (1933); *Fitt* v. *Central Illinois Public Service Co.,* 273 Ill. 617, 113 N. E. 155 (1916); *Friedman Mfg. Co.* v. *Industrial Commission,* 284 Ill. 554, 120 N. E. 460 (1918); *St. Louis Pressed Steel Co.* v. *Schorr,* 303 Ill. 476, 135 N. E. 766 (1922); *People ex rel. Brittain* v. *Outwater,* 360 Ill., 621, 196 N. E. 835 (1935); *People ex rel. McDonough* v. *Beemsterboer,* 356 Ill. 432, 190 N. E. 920 (1934), certiorari denied, 293 U. S. 575 (1934), rehearing denied, 293 U. S. 630 (1934).

higher rates. Dismissing the bill, this Court said (p. 440):

> The bill shows that the Secretary, after inquiry and full hearing, fixed rates thereafter to be charged by the appellees, and these had not been set aside or enjoined in any appropriate judicial proceeding or been altered by subsequent order of the Secretary. The court was, therefore, without power to enjoin the prosecution of the appellees for charging rates other than those established by the Secretary.

It is recognized in the foregoing cases that, where the statutory review procedure has not been pursued, a defense based upon the alleged invalidity of administrative action is as inadmissible as the institution of a suit to enjoin enforcement.

Appellants in choosing to disregard the available statutory methods of review and to subject themselves to criminal prosecution by violating the regulation have made that choice knowing in advance that they would not be permitted to challenge the violated regulation in the criminal suits. Congress has accorded to appellants ready access to a proper forum in which all objections to a regulation may be presented and fully considered. Their right to challenge an allegedly invalid regulation has not been abridged. The only restrictions placed on their rights in

this respect are (1) the customary requirement, enforced by the courts themselves even in the absence of statute, that objections to any administrative order first be brought to the attention of the administrative agency; (2) the requirement, traditionally observed under statutes of this type, that where a statutory judicial forum is provided and designated as exclusive, objections to an administrative order shall be presented in such forum; and (3) the indispensable wartime enforcement of obedience to price controls pending completion of review proceedings (see pp. 29–48, *supra*).

There is no merit in appellants' contention that the Act violates their right under the Sixth Amendment to a jury trial in the district wherein the crime has been committed. Venue of the pending criminal suits is laid in the district where the crimes charged were committed. Appellants have cited no authority, and we know of none, setting up a requirement that the test of the constitutionality of an administrative order be within the district where the crime of its violation is prosecuted. The constitutional guarantee does not necessitate trial by a judge from the district, *Lamar* v. *United States*, 241 U. S. 103, and the issue of the validity of the regulation need not be settled by jury trial. Cf. *Block* v. *Hirsh*, 256 U. S. 135, 158. This Act does not trench upon

any right guaranteed to Appellants by the Sixth Amendment.[22]

Finally, appellants' attempt to impeach the validity of section 204 (d) by attacking the validity of the substantive provisions of the Act is wholly unsound. The contention in effect means that Congress could never establish exclusive methods for judicial determination of constitutional questions under regulatory statutes. See *Kittrell* v. *Hatter*, 10 So. (2d) 827, 832 (Ala. 1942). In *Arrow Distilleries, Inc.* v. *Alexander*, 24 F. Supp. 880 (District of Columbia, 1938), affirmed per curiam, 306 U. S. 615, the authority of Congress to establish such a procedure was upheld with refusal by the Court to consider the substantive constitutionality of the statute. In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, this Court gave effect to a statutory exclusive review provision and denied the right to a district court injunction without considering petitioner's claim that its business was wholly in intrastate commerce and hence not subject to the statute. The validity of the procedural provisions is a distinct threshold question.

[22] It may be observed that if the objection is addressed to the need to come to Washington to appear before the Emergency Court of Appeals, the rules of that Court specifically provide that it may sit anywhere. Rule 4 (a), Rules of the United States Emergency Court of Appeals.

II

APART FROM THE WITHDRAWAL OF JURISDICTION BY SECTION 204 (D) THE BILL OF COMPLAINT DID NOT PRESENT A CASE WITHIN THE EQUITY JURISDICTION OF THE COURT

In Point I we have discussed the validity of the statutory withdrawal of jurisdiction in the court below to restrain criminal enforcement proceedings. Since this was the ground of decision in the court below, and since it rests on the explicit terms of the statute itself, it has seemed proper to place our discussion primarily on this ground. We submit, however, that even apart from the express withdrawal of jurisdiction the bill did not present a case within the equity jurisdiction of the court. In this aspect, the express withdrawal of jurisdiction may be regarded as a legislative codification of what would in any event be sound equity practice. We shall discuss the case from this point of view in relation to injunctive relief against both the pending criminal prosecution and threatened future prosecutions.

The bill seeks to put in issue the validity of the substantive provisions of the Price Control Act (paragraph 36). It is clear that this issue is not properly presented as a basis of relief against the pending criminal prosecution, since the validity of the Act may be challenged in the criminal case itself. Section 204 (d) of the Act

permits such a defense, as the court below said. See p. 14, n. 3, *supra*. Indeed, in a number of cases the defense of invalidity of the Act has been passed on by district courts and with one exception the decisions have sustained its validity.[28]

A further ground of attack is that the limitation of the issues in a district court proceeding is invalid. It is true that under Section 204 (d) an attack on the validity of the regulations, as distinguished from the validity of the statute, can be made only in the Emergency Court of Appeals. But to the extent that this division of functions raises a constitutional issue it can be determined in the criminal case, since the attack in this respect is on Section 204 (d) of the Act itself. In fact, such attacks have been considered in criminal cases, and it may be noted in passing that the validity of the division of functions has there

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[28] See *Henderson* v. *Kimmel*, 47 F. Supp. 635 (D. Kan.); *Henderson* v. *Detweiler*, OPA Service 622:28 (D. Neb., Oct. 27, 1942); *Brown* v. *Wick*, OPA Service 622:54 (E. D. Mich., Feb. 19, 1943); *United States* v. *Charney*, OPA Service 620:66 (D. Mass., Dec. 17, 1942); *United States* v. *C. Thomas Stores, Inc.*, OPA Service 620:69 (D. Minn., Feb. 26, 1942); *United States* v. *Slobodkin*, OPA Service 620:73 (D. Mass., March 2, 1943); *United States* v. *Hark & Yaffee*, OPA Service 620:86 (D. Mass., March 5, 1943); *United States* v. *Sosnowitz & Lostein*, OPA Service 620:105 (D. Conn., March 25, 1943); *United States* v. *Friedman*, OPA Service 620:103 (D. Conn., March 25, 1943); *Helena Rubinstein* v. *Charline's Cut Rate*, 28 A. (2d) 113 (N. J. Eq., Sept. 11, 1942); *United States* v. *Ehrlich*, S. D. Fla., Apr. 13, 1943. *Contra: Roach* v. *Johnson*, N. D. Ind., pending on appeal, No. 840, present Term.

been sustained. *United States* v. *C. Thomas Stores, Inc.*, D. Minn., Feb. 26, 1943, OPA Service 620: 69; *United States* v. *Slobodkin*, D. Mass., March 2, 1943, OPA Service 620: 73; *United States* v. *Friedman*, D. Conn., March 25, 1943, OPA Service 620: 103; *United States* v. *Sosnowitz*, D. Conn., March 25, 1943, OPA Service 620: 105. Cf. *Henderson* v. *Kimmel*, 47 F. Supp. 635 (D. Kan.) (civil enforcement).

So far as the bill seeks to enjoin the pending criminal action, therefore, there is no reason to depart from the familiar principle that equity will not restrain a pending criminal prosecuton. *In re Sawyer*, 124 U. S. 200; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45, 49. As was said by Mr. Justice Hughes in *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620–621:

> A court of equity, said this court in *In re Sawyer*, 124 U. S. 200, 210, "has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors. .. . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, . . . is to invade the domain of the courts of common law, or of the executive and administrative department of the government." *Harkrader* v. *Wadley*, 172 U. S. 148, 170; *Fitts* v. *McGhee*, 172 U. S. 516, 531; 2 Story's Eq. Jur., § 893.

Those cases in which injunctions were granted to restrain future prosecutions were thus distinguished (223 U. S. at 621):

> But a distinction obtains when it is found to be essential to the protection of the property rights, as to which the jurisdiction of a court of equity has been invoked, that it should restrain the defendant from instituting criminal actions involving the same legal questions. This is illustrated in the decisions of this court in which officers have been enjoined from bringing criminal proceedings to compel obedience to unconstitutional requirements. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 217, 218; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, 209 U. S. 123, 161, 162; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165. In this, there is no attempt to restrain a court from trying persons charged with crime, or the grand jury from the exercise of its functions, but the injunction binds the defendant not to resort to criminal procedure to enforce illegal demands.

We turn to a consideration of the bill as it is aimed at the restraint of future prosecutions. The bill and jurisdictional statement allege the invalidity of the substantive provisions of the Act, and appear to deduce therefrom a conclusion of invalidity of the procedural provisions. But, as we have pointed out above (p. 58), this is to start

at the wrong end. While the complainants must show the probable invalidity of the substantive provisions of the statute to justify injunctive relief, that is an additional requisite; the basic showing must be that the procedure prescribed by the statute is invalid and would cause irreparable damage. *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331.

The bill alleges the threat of multiple penalties. It may be doubted whether the allegations are sufficient to bring it within the cases permitting injunctive relief against imminent threat of prosecutions with multiple and oppressive penalties. See *Watson* v. *Buck,* 313 U. S. 387, 400.

The defect in the bill, however, is much more fundamental than a mere defect of pleading. The bill proceeds on an erroneous assumption regarding the basis for equitable relief against the threat of multiple criminal penalties. Such penalties are not invalid *per se.* The legislature is free to impose penalties substantial enough to induce compliance with the law. The cases which have enjoined such penalties have rested on a very different ground: That there was no way of challenging the statute save by violating it and awaiting prosecution; and where the penalties were so oppressive as to make violations prohibitory all effective avenues of challenging the statute were blocked. The principle was explained in *Wadley*

Southern Railway v. *Georgia*, 235 U. S. 651, 662, discussing the cases which granted injunctions:

> These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. * * *

Under the Price Control Act the appellants can secure review of the statute and regulations in protest procedure and in the Emergency Court of Appeals. They are thus not placed in the dilemma which has characterized those parties who have secured injunctive relief against the imposition of criminal penalties. If it is argued that the procedure available is not adequate, the answer is that the argument can be made in other forums without the necessity for the extraordinary remedy of injunction. It is true that the statute prohibits any court, including the Emergency Court of Appeals, from issuing a stay to restrain the enforcement of regulations pending review in the Supreme Court. But whether the denial of a stay could validly be imposed on the appellants is a question which need not be considered in this proceeding. Recourse to the orderly protest procedure might have brought adequate relief. Any facts which would require a

stay could most appropriately be developed through the protest procedure which furnishes the record in the Emergency Court of Appeals. Moreover, there is no constitutional right to a stay. See *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 10. And, as we have undertaken to show (pp. 31–48, *supra*), Congress was entitled to generalize concerning those factors of public interest which are normally given great weight in granting or withholding stays or interlocutory injunctive relief.

It is important, in considering the relative appropriateness of injunctive proceedings and the protest procedure as a basis on which to judge appellants' claims, to examine more precisely the nature of their attack. The bill does not base the allegation of irreparable damage on the inadequacy of the maximum selling price the violations of which form the basis of the prosecutions. The attack is rather on the existence of maximum price ceilings at the stage in the economic process occupied by the packers, from whom the appellants purchase. It is therefore pertinent to inquire how an injunction against prosecution for sales in excess of the wholesalers' ceiling prices will help the appellants, unless they are given freedom also to buy in violation of the packers' ceiling prices and unless the packers would thereby be led to sell for higher prices and so increase their purchases from livestock producers. It is

this chain of events which must ensue, on the theory of the bill, if appellants are to have effective relief. But the packers are not parties in the present suit. Some, in fact, filed protests with the Administrator which have been acted upon. See *In the matter of Kaufman Beef Company, et al.*, Docket No. 1169–2–P, March 29, 1943. The packers may be in a position to force livestock prices down by exerting their dominant purchasing power. And other factors are doubtless operating to cause the shortages of which appellants complain.[29] Furthermore, retailers are not parties to the suit; and appellants' theory of relief presupposes that retailers would pay higher prices despite the ceilings in force on retail sales.

What the appellants are seeking is a revision of the judgment of the administrative agency which

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[29] In the *Kaufman* opinion, *supra*, the Administrator found that the meat packing industry has a dominant influence on the prices of beef cattle. He also concluded that—

"Removal of inequalities in maximum prices has restored normal competitive relationships among purchasers in the live cattle markets. It is anticipated that specific retail prices and consumer rationing already programmed will lessen the strain on a 'short' market. Finally, vigorous enforcement of maximum prices at all levels will eliminate pressures caused by 'black market' activities. Altogether, exercise of the Administrator's authority and the cooperation of other government agencies in carrying out the program of control of beef prices is aimed at protecting producers, processors, distributors and consumers alike."

is charged with enforcing price control fairly among the several interested groups—producers, packers, wholesalers, retailers and consumers. We do not deny that appellants are entitled to have the administrative judgment reconsidered. We do insist that they have not chosen the proper forum or sought the proper form of relief. If any question ever called for the pursuit of administrative remedies this is such a question. It calls for uniform determination, not the varying judgments of district courts throughout the country. It calls for the orderly preparation of a record in proceedings to which the Administrator is a party. It calls for delicate and resourceful adjustments as may be needed, not for a sweeping injunction releasing controls as they are applied to transactions and persons not even the subject of the criminal prosecutions.[30]

[30] The impropriety of injunctive relief is accentuated by the fact that, as the bill of complaint observes (par. —), many of the indictments contain counts for the keeping of false records. These offenses are presumably separable (cf. *Kay v. United States*, 303 U. S. 1), particularly in view of the independent importance of accurate information concerning a vital part of our national economy in wartime. Cf. *Electric Bond & Share Co., v. Securities and Exchange Commission*, 303 U. S. 419.

CONCLUSION

For the foregoing reasons the judgment should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 934.—October Term, 1942.

Clem Lockerty, Anthony Caruso, Edward A. Carroll, et al., Appellants,
vs.
Charles M. Phillips, United States Attorney for the District of New Jersey.

Appeal from the District Court of the United States for the District of New Jersey.

[May 10, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question for our decision is whether the jurisdiction of the district court below to enjoin the enforcement of price regulations prescribed by the Administrator under the Emergency Price Control Act of 1942, 56 Stat. 23, was validly withdrawn by § 204(d) of the Act. Appellants brought this suit in the district court for the District of New Jersey for an injunction restraining appellee, the United States Attorney for that district, from the prosecution of pending and prospective criminal proceedings against appellants for violation of §§ 4(a) and 205(b) of the Act, and of Maximum Price Regulation No. 169. In view of the provisions of § 204(d) of the Act, the district court of three judges, 28 U. S. C. § 380a, dismissed the suit for want of jurisdiction to entertain it.

The amended bill of complaint alleges that appellants are established merchants owning valuable wholesale meat businesses, in the course of which they purchase meat from packers and sell it at wholesale to retail dealers; that Maximum Price Regulation No. 169, promulgated by the Price Administrator under the purported authority of § 2(a) of the Act, as originally issued and as revised, fixed maximum wholesale prices for specified cuts of beef; that in fixing such prices the Administrator had failed to give due consideration to the various factors affecting the cost of production and distribution of meat in the industry as a whole; that the Administrator had failed to fix or regulate the price of livestock; that the conditions in the industry — including the

quantity of meat available to packers for distribution to wholesalers, the packers' expectation of profit, and the effect of these conditions upon the prices of meat sold by packers to wholesalers —are such that appellants are and will be unable to obtain a supply of meat from packers which they can resell to retail dealers within the prices fixed by Regulation No. 169; that enforcement of the Regulation will preclude appellants' continuance in business as meat wholesalers; that the Act as thus applied to appellants is a denial of due process in violation of the Fifth Amendment of the Constitution, and involves an unconstitutional delegation of legislative power to the Administrator; that appellee threatens to prosecute appellants for each sale of meat at a price greater than that fixed by the Regulation, and to subject them to the fine and imprisonment prescribed by §§ 4 and 205(b) of the Act for violations of the Act or of price regulations prescribed by the Administrator under the Act; and that such enforcement by repeated prosecutions of appellants will irreparably injure them in their business and property.

Section 203(a) sets up a procedure whereby any person subject to any provision of any regulation, order or price schedule promulgated under the Act may within sixty days "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections". He may also protest later on grounds arising after the expiration of the original sixty days. The subsection directs that within a specified time "the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

By § 204(a), "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part." Subsection (b) provides that no regulation, order, or price schedule, shall be enjoined "unless the complainant establishes to the satisfaction of the court

that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious". Under subsections (b) and (d), decisions of the Emergency Court may, by writ of certiorari, be brought for review to the Supreme Court, which is required to advance the cause on its docket and to expedite the disposition of it.

Although by following the procedure prescribed by these provisions of the Act appellants could have raised and obtained review of the questions presented by their bill of complaint, they did not protest the price regulation which they challenge and they took no proceedings for review of it by the Emergency Court. Appellants are thus seeking the aid of the district court to restrain the enforcement of an administrative order without pursuing the administrative remedy provided by the statute (cf. *Illinois Commerce Commission* v. *Thomson*, No. 178, decided April 12, 1943, p. 9), and without recourse to the judicial review by the Emergency Court of Appeals and by this Court which the statute affords.

Moreover the statute vests jurisdiction to grant equitable relief exclusively in the Emergency Court and in this Court. Section 204(d) declares: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

By this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any par-

ticular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 234, and cases cited; *McIntire* v. *Wood*, 7 Cranch 504, 506. The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good". *Cary* v. *Curtis*, 3 How. 236, 245; *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 330; *Hallowell* v. *Commons*, 239 U. S. 506, 509; *Smallwood* v. *Gallardo*, 275 U. S. 56; *Toucey* v. *N. Y. Life Ins. Co.*, 314 U. S. 118, 129. See also *United States* v. *Hudson and Goodwin*, 7 Cranch 32, 33; *The Mayor* v. *Cooper*, 6 Wall. 247, 252; *Stevenson* v. *Fain*, 195 U. S. 165, 167; *Kentucky* v. *Powers*, 201 U. S. 1, 24; *Chicot County Dist.* v. *Bank*, 308 U. S. 371, 376. In the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court. Nor can we doubt the authority of Congress to require that a plaintiff seeking such equitable relief resort to the Emergency Court only after pursuing the prescribed administrative procedure.

Appellants argue that the command of § 204(d) that "no court, Federal, State, or Territorial, shall have jurisdiction or power to . . . restrain, enjoin, or set aside . . . any provision of this Act" extends beyond the mere denial of equitable relief by way of injunction, and withholds from all courts authority to pass upon the constitutionality of any provision of the Act or of any order or regulation under it. They insist that the phrase "set aside" is to be read broadly, as meaning that no court can declare unconstitutional any such provision, and that consequently the effect of the statute is to deny to those aggrieved by statute or regulation, their day in court to challenge its va-

stitutionality. But the statute expressly excepts from this command those remedies afforded by § 204, including that of subsection (b), which gives to complainants a right to an injunction whenever they establish to the satisfaction of the Emergency Court that the regulation, order, or price schedule is "not in accordance with law, or is arbitrary or capricious". A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored. The present Act has at least saved to the Emergency Court, and, upon review of its decisions, to this Court, authority to determine whether any regulation, order, or price schedule promulgated under the Act is "not in accordance with law, or is arbitrary or capricious". We think it plain that orders and regulations involving an unconstitutional application of the statute are "not in accordance with law" within the meaning of this clause, and that the constitutional validity of the Act, and of orders and regulations under it, may be determined upon the prescribed review in the Emergency Court.

Appellants also contend that the review in the Emergency Court is inadequate to protect their constitutional rights, and that § 204 is therefore unconstitutional, because § 204(c) prohibits all interlocutory relief by that court. We need not pass upon the constitutionality of this restriction. For in any event, the separability clause of § 303 of the Act would require us to give effect to the other provisions of § 204, including that withholding from the district courts authority to enjoin enforcement of the Act—a provision which as we have seen is subject to no unconstitutional infirmity.

Since appellants seek only an injunction which the district court is without authority to give, their bill of complaint was rightly dismissed. We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it.

Affirmed.